In forma pauperis
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IN THE

Supreme Court of the United States

No. 283 October Term, 1942

MAX WEINER and STEPHEN G. ZVON,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Opinions of the Courts Below

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I.

OPINIONS OF THE COURTS BELOW

A. The opinion of the Trial Court (Dauphin County, Pennsylvania) is reported in 51 Dauphin County Reps. 229.

B. The opinion of the Superior Court of Pennsylvania is reported in 148 Pa. Superior Ct. 577, 25 Atlantic Reps. (2d) 844.

II.

STATEMENT OF JURISDICTION

The petitioners seek to invoke jurisdiction under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 937 (28 U.S.C.A. 344).

III.

SUMMARY OF ARGUMENT

The respondent respectfully submits that certiorari should be denied for the following reasons:

1. The Commonwealth's evidence was not obtained under compulsion.

2. The decision of the Superior Court of Pennsylvania on the evidence of conspiracy is fully consonant with the applicable state decisions. Whether the Court erred in its construction of the applicable law of the state on the subject of conspiracy, is not a Federal question.

3. The consolidation for trial of the indictments is in accord with the applicable state decisions and did not work a denial of any fundamental right of the petitioners.

4. The petitioners have failed to cite a single authority in support of their prayer for certiorari.

IV.

ARGUMENT

1. The Commonwealth's evidence was not obtained under compulsion.

It is contended that the Commonwealth's evidence was obtained under circumstances amounting to a denial of due process of law. The petitioners in their briefs filed in the Pennsylvania Courts and in their petition for writ of certiorari have in a patently far-fetched and extravagant manner made the blanket charge that all of the testimony coming from the mouths of all of the witnesses called by the Commonwealth was secured as the result of fear and intimidation imposed upon them.

The petitioners were indicted and convicted on charges involving: The procurement, with intent to prevent a free and pure election, of signatures to nomination papers of the Communist Party by means of false and fraudulent statements; a conspiracy to so obtain said signatures; and, the making of false statements in affidavits appended to such nomination papers.

These prosecutions were instituted following an independent and exhaustive investigation by the District Attorney of Dauphin County in consequence of widespread charges and complaints—following the publication in the Evening News (a newspaper of the City of Harrisburg) of the names of the signers of the Communist Party nomination papers—that the signers had been deceived as to the object and purpose of the papers that they had signed.

All of the witnesses called, with two or three exceptions, testified that when they signed the nomination paper they were not told and they did not know that it was a nomination paper for the Communist Party, and if they had known that it was a nomination paper for the Communist Party, they would not have signed it. They testified that the Communist Party was not mentioned in connection with the paper. At least fifty witnesses testified that the representation was that they were to get higher W.P.A. wages; ten that they were to get more relief money; approximately fourteen that it would keep the United States out of war; four or five that it was for a third term for Roosevelt; a number that it was to better conditions for the poor people; still others that it was to secure old age and soldiers' pensions and mothers' assistance. Approximately twenty-six of the witnesses testified that when the paper was presented it was folded by the defendants in such a manner as to obscure the fact that it was a Communist nomination paper. The witnesses indicated that practically the same language and the same methods were used by both Weiner and Zvon to obtain the signatures.

All of the witnesses called by the Commonwealth were subjected to a searching cross-examination by the petitioners. The issue as to whether or not the witnesses testified because of fear and intimidation was put squarely to the jury by the Trial Judge in his charge (N. T. 919-920).

The publication in the Harrisburg newspaper of the list of signatures on the Communist nomination papers created considerable discussion in the part of town where the signers lived. As a result of these neighborhood discussions, many people visited the newspaper office to have as they said "their names taken off the petition." It is contended by the petitioners that this was a form of intimidation which threw the community into a "wholesale fear." Counsel for the

petitioners in the State Courts in inordinate language described it to be "the essence of legal lynching." Nearly all of the witnesses stated that they went to the newspaper office because they did not know anything about the Communist Party, had been mislead, and wanted to be relieved of any stigma based upon what they had heard. Prior to that time, they were ignorant and misinformed as to the nature of the papers. We cannot agree that the publication of the true nature of the papers is identical with threats or intimidation.

Some of the witnesses stated on cross-examination that they felt that they had done some wrong in signing the petitions because it was against the sentiment being expressed in their neighborhood. For this reason, the petitioners argue that it necessarily follows that their testimony as to the manner in which their signatures were obtained was perjured testimony induced by threats and intimidation. This argument we contend is wholly without merit. As the Trial Court aptly said, the testimony shows nothing more than the idle gossip of ignorant people caused by signing something they did not understand.

The petitioners in the opening of their brief refer to alleged happenings in other States and an alleged campaign of abuses against the Communist Party. None of these matters appear upon this record and cannot if true have any bearing on the decision in this case. Furthermore, the contents of the Dies Committee letters were never produced or introduced into evidence. Using the alleged happenings in other States as facts having a direct bearing and as a flash board upon which to distort the facts in this record, the petitioners make the bold statement that agencies, both private and public, threatened the witness signers with reprisals if repudiations were not forthcoming. We ask the Court to read carefully the record in this case and we are

confident that it will appear that the charge made is absolutely unjustifiable and without foundation. The opinions of both the Trial Court and the Superior Court answer the charge of denial of due process in a manner both adequate and irrefutable.

The petitioners cite two cases in the support of their positions: *Brown v. Mississippi*, 297 U. S. 278, and *Chambers, et al., v. Florida*, 309 U. S. 227. Both of these cases deal with convictions which rested solely upon confessions of defendants shown by indisputable evidence to have been extorted by officers of the State by brutality and violence. It will be seen, by careful reading of this record, that these cases are not applicable to the instant case but are cited in an effort to cover up the wrongdoing of the petitioners. We submit that the State Courts in finding that there was no proof of coercion or of improper conduct by anyone in connection with the trial properly held that these cases were not applicable.

In any event, the convictions in these cases did not rest solely upon the evidence of witnesses influenced as the petitioners claim by fear and intimidation. The testimony of scores of witnesses show that they were not influenced in any manner in their testimony by the discussion in the community. The following are examples: Edward J. Heckard (N. T. 92); Aaron Corum (N. T. 99); Maggie Glasber (N. T. 116); Annie Smith (N. T. 121); Pauline Hopkins (N. T. 125); Helen Bayard (N. T. 135); Clara Divens (N. T. 167); Maude Lewis (N. T. 177); Marion McWhite (N. T. 186); Lester E. Shell (N. T. 254); Lucas Haley (N. T. 305); Laura A. Troup (N. T. 332); Ben Todoroff (N. T. 425); Eva Crowe (N. T. 431); Thomas Willis (N. T. 469); Fred Davis (N. T. 474); Eugene Adams (N. T. 517); Edward James Johnson (N. T. 533); Garnetta Washington (N. T. 545); Eugene W. Parker (N. T. 548); George W. Scott (N. T.

562); Bessie Dukes (N. T. 581) and Benjamin F. Dean (N. T. 586).

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2. The decision of the Superior Court of Pennsylvania on the evidence of conspiracy is fully consonant with the applicable state decisions. Whether the Court erred in its construction of the applicable law of the state on the subject of conspiracy, is not a Federal question.

The petitioners contend that they were deprived of due process of law, in that the Superior Court sustained the conviction for conspiracy.

The Commonwealth introduced an abundance of evidence to justify the submission of the case to the jury and to warrant and sustain a conviction of conspiracy under the applicable State decisions.

The Commonwealth called some seventy or eighty witnesses who signed the Communist nomination papers. With the exception of one or two, they all testified to the misrepresentations that were made. A reiteration of these facts would merely burden this brief. The misrepresentations were made, according to the evidence in most instances, by the petitioners acting not together but with one Oliver Milton, a colored man. The evidence showed that Weiner had charge of the campaign to secure the signatures in Dauphin County. He secured Zvon to assist him and it was at his instigation that Milton accompanied both himself and Zvon in the visits in which the signatures were obtained. Zvon testified that he solicited the signatures at the request and under the instructions of Weiner. Thus it will be seen that at the outset, the petitioners were joined together in a common purpose. The evidence showed that though Weiner and Zvon acted separately they used pre-

cisely the same tactics. The variations in language and methods used by both were but slight. Many of the witnesses testified that the paper when presented was folded in the same manner either by Zvon or Weiner so as to obscure its true nature. Milton accompanied one and then the other.

The methods used by the petitioners were so similar that it is inconceivable that their conduct could be attributed to a coincidence rather than a general agreement to knowingly make untrue and fraudulent statements, and both the Trial Court and the Superior Court so held. This is not a case of mere suspicion or possibility of guilty connection as contended by the petitioners; such an arrangement as engaged in by the petitioners as shown by the evidence could not possibly have been for a legitimate purpose. The facts and circumstances were consistent with their guilt, and inconsistent with their innocence.

The decisions in both the Superior Court and the Supreme Court in Pennsylvania fully sustain the conviction of conspiracy based upon the evidence as presented. It has been repeatedly held that the acts of the parties may show that there was a concerted action pursuant to a common design to accomplish a common purpose. In the case of *Commonwealth v. Snyder*, 40 Pa. Sup. Ct. 485; at page 523, the Court after stating that the Commonwealth is not required to show that the defendants acted jointly or at one time, said: "When two or more persons pursue by their acts the same object, often by the same means, one performing one part of an act, the other another part of the same act, with a view to complete it, and with a view to attaining the object which they are pursuing, the acts of each must necessarily be proved separately, and where there is a charge of conspiracy the acts of each, with regard to the subject-matter of the charge, are always evidence against that particular defendant * * * It was not

necessary to prove that they had all met to conceive the scheme, nor to prove by whom it was originated." See, also, *Commonwealth v. Jermyn,* et al., 101 Pa. Sup. Ct. 455; *Commonwealth v. Rhey,* 140 Pa. Sup. Ct. 340; *Commonwealth v. Strantz,* 328 Pa. 33; *Commonwealth v. Antico,* et al., 146 Pa. Sup. Ct. 293. Also the opinion of the Superior Court in this case on the question of criminal intent was proper and in line with the decisions of that Court, particularly *Commonwealth v. Kirk,* 141 Pa. Sup. Ct. 123.

The petitioners having failed to show that they have been deprived of any fundamental and absolutely all-important right, this Court is bound by the construction which the State court gave to its own Constitution and Statutes and the law which obtains in the State. Whether the State Court erred in its construction of the common law of the State on the subject of conspiracy is not a Federal question. *West v. Louisiana,* 194 U. S. 258.

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3. The consolidation for trial of the indictments is in accord with the applicable state decisions and did not work a denial of any fundamental right of the petitioners.

The petitioners next complain that in the consolidation of the indictments for trial, they were denied due process of law. The Trial Court followed the usual practice of consolidating indictments charging offenses committed in the consummation of a corrupt agreement. All of the evidence that was admissible on the crimes charged in the other indictments tended to support the conspiracy charge. The ordering of a joint trial under these circumstances is fully in accord with the Pennsylvania decisions, see, *Commonwealth v. Cauffiel,* 97 Pa. Sup. Ct. 202; *Commonwealth v. Tracey,* 137 Pa. Sup. Ct. 221; and *Commonwealth v. Quinn,* 144 Pa. Sup. Ct. 400.

The State has full control over the procedure in its Courts, both in civil and in criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Brown v. New Jersey*, 175 U. S. 172. The petitioners have failed to show that any fundamental right was denied to them by a consolidation of the indictments for trial.

When the essential elements of a Court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution. *Jordon v. Massachusetts*, 225 U. S. 167.

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4. The petitioners have failed to cite a single authority in support of their prayer for certiorari.

It is significant that the petitioners in asserting three grounds for certiorari have failed to cite a single applicable case with respect to the question of whether certiorari may be predicated upon the bases named. We respectfully submit that a review of the applicable authorities establishes that none of the grounds submitted is tenable. The petitioners have failed to show that the Superior Court decision is clearly erroneous or that the petitioners have been deprived of any fundamental right guaranteed by the Constitution.

Wherefore, respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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